

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)	
WASHINGTON STATE COUNCIL OF CITY)	CASE NO. 7470-C-88-398
AND COUNTY EMPLOYEES LOCAL 1553)	
For clarification of an existing)	DECISION 3011 - PECB
bargaining unit of employees of:)	
SPOKANE COUNTY)	ORDER CLARIFYING
)	BARGAINING UNIT
)	
)	

William Keenan, Staff Representative,
appeared on behalf of the petitioner.

Robert Binger, Deputy Prosecuting Attorney,
appeared on behalf of the employer.

On June 16, 1988, Washington State Council of County and City Employees, Local 1553, filed a petition with the Public Employment Relations Commission, seeking clarification of an existing bargaining unit of employees of Spokane County. The petitioner seeks a ruling on whether an employee of the county's "9-1-1" emergency communications service system remains a confidential employee or a supervisor excluded from the bargaining unit following an alleged change of circumstances. A hearing was held before J. Martin Smith, Hearing Officer, on July 7, 1988. No post-hearing briefs were filed.

BACKGROUND

The Washington State Council of County and City Employees (WSCCCE) represents several bargaining units of employees of Spokane County. The bargaining relationship pre-dates the

creation of the Public Employment Relations Commission, and may pre-date the enactment of Chapter 41.56 RCW. The recognition clause of the 1986-88 collective bargaining agreement between the parties states:

The employers recognize the Union as the sole and exclusive bargaining representative of the regular employees in classifications listed in the Appendix to the Agreement, in the departments of Assessor, Auditor, Treasurer, Clerk, Purchasing, Printing and Duplicating, Systems Services, Planning, Prosecuting Attorney, District Court, Courthouse Building and Grounds, Parks and Recreation, Animal Control, 911 Emergency Communications and Building and Safety, except for those who are working in a classification where another bargaining agent has been certified as the bargaining representative.

The chief Deputies, Assistant Directors, the Department Head secretaries, clerical employees of planning, parks and recreation, and animal control shall be excluded from the provision of this article I. Other excluded positions shall be agreed to by the employers and the Union.

WSCCCE Local 1553 thus represents a bargaining unit which can be described as a general "courthouse" bargaining unit.

In April, 1982, the County posted a promotional notice for a secretary to the 9-1-1 system director. The notice indicated a need for a person to serve the director of 9-1-1, and to "attend meetings or hearings ... compile notes ... train and evaluate new staff as required." Under the county's personnel system, the title of "secretary" implies greater independent judgment than is required of employees holding the title of "office assistant", but does not necessarily indicate that the employee is a supervisor or confidential employee. A secretary can be called upon to assist department heads in talking to the

general public or in taking certain personnel-related actions. The county has no job description for "administrative assistants", "head secretaries" or "supervisory secretaries".

On June 1, 1982, Phil Brennan was appointed as Director of the 9-1-1 system. Marilyn Bauer was hired on the same date, pursuant to the April 20, 1982 announcement, to be secretary to the director. Subsequently, three dispatch supervisors and 18 emergency communications operators were hired and trained. The emergency communications system functioned as a relatively independent operation for approximately five years, under the authority and control of the "Spokane County Emergency Services Communication Board". That 11-member board was created in September of 1983, by Local Ordinance Chapter 1.08B. Its membership consisted of county commissioners, local police officials, and local fire department officials. Director Brennan and Ms. Bauer were present during meetings of the board, to convey information and answer questions concerning the 9-1-1 operation.

Spokane County recognized the WSCCCE as exclusive bargaining representative of employees in the 9-1-1 operation as the result of representation proceedings before the Commission in Case No. 5563-E-84-1007. The union filed a petition on November 26, 1984, seeking to be certified as the exclusive bargaining representative of "all regular full time and regular part time employees employed as emergency communications officers." At that time, the union contemplated an exclusion of only the emergency communications director. The county responded by insisting upon the exclusion of three supervisors in addition to the director. It does not appear that the secretary to the director was discussed in the context of those representation proceedings. A cross-check was conducted and the WSCCCE received certification. Spokane County, Decision

2141 (PECB, 1985). The 9-1-1 employees were accreted, by agreement of the parties, to the courthouse bargaining unit represented by Local 1553. The employer and the WSCCCE also agreed to place the three supervisors in a separate bargaining unit of supervisors represented by Local 1553S.

For reasons not pertinent here, the management of the 9-1-1 system became the target of public criticism and inquiry. In early October of 1987, Director Brennan resigned. By resolution dated October 13, 1987, the Spokane County Emergency Services Communication Board accepted Brennan's resignation and appointed Spokane County Sheriff Larry Erickson as "temporary 9-1-1 director" for the period ending December 31, 1988.

Sheriff Erickson designated Lieutenant R. C. Stavig of his office to be deputy director of 9-1-1. On November 10, 1987, Stavig indicated that Corporal Frank Strasser of the Spokane County Sheriff's Department and Lieutenant Terry LaLiberte of the Spokane Police Department would "assist in testing and training of new employees".

Except for a period under "paid personal leave", Marilyn Bauer continued as a secretary in the employ of Spokane County, working in the 9-1-1 system. In January of 1988, Bauer requested that her position be included in the bargaining unit represented by Local 1553, under the theory that she was then a secretary to a lieutenant in the sheriff's department who was not a "department head" within the meaning of the recognition clause of the labor agreement. WSCCCE Staff Representative Bill Keenan made a request of county Personnel Director Charles Wright on January 25, 1988, using a similar theory. Payroll dues deduction forms and an authorization card were included with the letter to Wright.

By letter dated March 14, 1988, Wright denied the request for inclusion of Bauer's position in the bargaining unit, indicating that Bauer remained a secretary to a department head, and so ought to remain excluded. Lieutenant Stavig was cited as the "department head". This petition followed.

POSITIONS OF THE PARTIES

The union argues that the secretary position in the 9-1-1 operation is no longer either supervisory or confidential in nature, due to a change in the organization of the management of the system. It contends that Bauer has no supervisory authority or labor-relations activity for the new director of the system, and that her position should be returned to the courthouse bargaining unit as a secretary and covered by the collective bargaining agreement.

The employer urges that, even though the former director of the 9-1-1 system has resigned, the director's functions have continued and are now provided by staff from the sheriff's department. It contends that Bauer remains a secretary to a department head, as defined by the labor agreement for the courthouse bargaining unit, and that she should remain excluded. The employer contends that exclusion is proper, irrespective of a loss of status as a confidential employee.

DISCUSSION

Was The Petition Timely Filed?

The petition in this case was filed mid-term in a collective bargaining agreement between the parties. The Public Employ-

ment Relations Commission has held in a series of cases beginning with Toppenish School District, Decision 1143-A (PECB 1981), that, although unit determination is not a mandatory subject of collective bargaining, parties who agree on units in a contract will have only limited rights to initiate unit clarification proceedings during the life of such a contract. This rule has now been codified in WAC 391-35-020, as follows:

(1) Disputes concerning status as a "confidential employee" may be filed at any time.

(2) Except as provided in subsection (1) of this section, where there is a valid written and signed collective bargaining agreement in effect, a petition for clarification of the covered bargaining unit will be considered timely only if:

(a) The petitioner can demonstrate, by specific evidence, substantial changed circumstances during the term of the collective bargaining agreement which warrant a modification of the bargaining unit by inclusion or exclusion of a position or class; or

(b) The petitioner can demonstrate that, although it signed the current collective bargaining agreement covering the position or class at issue in the unit clarification proceedings, (i) it put the other party on notice during negotiations that it would contest the inclusion or exclusion of the position or class via the unit clarification procedure and (ii) it filed the petition for clarification of the existing bargaining unit prior to signing the current collective bargaining agreement.

The arguments advanced by the union in this case would appear to place the situation within paragraphs (1) and (2)(a) of the rule. The dispute herein concerning the "confidential" status of the position could be raised at any time, and there is alleged to have been a change of circumstances.

The county's corollary argument, which is that even if Bauer were to be returned to the bargaining unit at this time, the whole system may change again after January 1, 1989, cannot be the basis for withholding a decision on this petition. The petition is timely filed, and PERC has jurisdiction to determine the dispute. If there is a further change of circumstances in the future, the employer will be in a position to take up the actual facts with the union at that time, and to initiate unit clarification proceedings on a "confidential" claim and/or a "changed circumstances" claim if a dispute is not promptly resolved by the parties themselves.

Is Marilyn Bauer Now a Confidential Employee?

RCW 41.56.030(2) provides for the exclusion of an individual from the definition of "public employee", and therefore from all bargaining rights and bargaining units under the statute, if that person has

... duties, as a deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head or body of the applicable bargaining unit ...

The key element in determining the existence of such a "confidential" relationship is a showing of an "intimate fiduciary relationship" which must concern the "formulation of labor relations policy." City of Yakima v IAFF, 91 Wa.2d 101 (1978). Thus, the test which is applied, commonly known as the "labor nexus test", is well-established. The party seeking exclusion has the burden of proof. City of Seattle, Decision 689-A (PECB, 1979).

Bauer was secretary to Phil Brennan for a period of five years. The record is clear that, over the course of that time,

she was delegated a good deal of responsibility for the execution of labor relations policy. Although her official job title was "secretary", she described her position as being more of an "administrative assistant". Bauer reviewed the 9-1-1 budget after Brennan drafted it, prepared requests for overtime, reviewed shift differential pay and prepared personnel action forms (including letters of reprimand). She was responsible for posting job openings in the personnel department, and arranged for applicants to take the polygraph examinations allowed, by law, for such employees. Bauer was responsible for taking notes of monthly meetings of the 9-1-1 oversight board. Such meetings included discussions of personnel issues relating to the communications officers working the dispatch center.

Bauer's fiduciary relationship and duties regarding 9-1-1 labor relations matters were exclusive to Brennan. At the same time, it can be aptly observed that Bauer's "confidential" exclusion was never more than "derivative", through Brennan's status as executive head or his confidential relationship with the control body governing the 9-1-1 operation. When Brennan resigned in August of 1987, Bauer's "confidential" duties came to an abrupt end.

Brennan was not replaced for three months. During that period, there was apparently no "confidential relationship" at all in the 9-1-1 system. During that time, Bauer provided clerical support for the three supervisors and 18 operators. Had there been no other changes in the 9-1-1 staffing, there would have been no reason to continue her exclusion from the bargaining unit.

A second change of circumstances occurred with the designation of Sheriff Erickson as temporary director of the 9-1-1 system.

Erickson soon appointed a law enforcement officer from the sheriff's department to function as director of the system, and two other law enforcement officers were assigned to test and train new employees. At no point was Bauer told she would continue as "confidential" secretary to the new managers. Indeed, until October of 1987, when Lieutenant Stavig moved his work station to the 9-1-1 location in the courthouse, Bauer was "pretty much alone." Further, preparation and review of the budget is solely in the hands of the sheriff's department. Bauer testified, and the county did not rebut, that one of the law enforcement officers who had been placed in charge of training began to perform many of the personnel duties which had formerly been performed by Bauer and Brennan. Bauer described her current duties as "very general" clerical work. Based on the record as a whole, Marilyn Bauer is not now a confidential employee.

Is Marilyn Bauer Now A Supervisor?

Supervisors are public employees with the meaning of Chapter 41.56 RCW, METRO v. Department of Labor and Industries, 88 Wn.2d 925 (1977), but are generally excluded from the bargaining unit which contains their rank-and-file subordinates. City of Richland, Decision 279-A (PECB, 1978); aff. 29 Wn.App 599 (Division III, 1981); pet. rev. den. 96 Wn.2d 1004 (1981). The existence of a separate unit of supervisors within Spokane County's workforce recognizes that precedent.

Marilyn Bauer may or may not have been a "supervisor" during the period when Brennan headed the 9-1-1 system. Under the current management, however, it is clear that Bauer no longer acts as a liaison between the operators and the management of the 9-1-1 system. Those tasks presumably are being accomplished by the law enforcement officers who have been put into

the structure. Further, it is clear that when Stavig is absent from the operation, that same law enforcement officer usually assumes control of the system. The evidence would not support a continued exclusion of Bauer from the bargaining unit as a "supervisor".

The Employer's Contract-Based Arguments

The county urges that Bauer continues to be a head secretary to the 9-1-1 department of Spokane County government, and therefore is excluded from the bargaining unit by the terms of the recognition clause of the collective bargaining agreement covering the courthouse unit. The employer contends that the exclusions were made prior to 1978, in order to provide for administrative support at the department head level by persons who are outside of the bargaining unit but who would not qualify for exclusion under the "labor nexus" test.

The employer's arguments are not persuasive on the facts of this case. Titles are never conclusive, and here are not even particularly persuasive in view of the evidence that there is no distinct classification or rank of department head secretaries or administrative assistants in the county's personnel policies. The recognition clause excluding "department head secretaries" may or may not have been descriptive of an appropriate unit exclusion in 1978 or some earlier time. It is not surprising the language should remain in the parties' agreement down to the present time, since many or most of the individuals filling such "secretary" positions may continue to perform duties which would justify their exclusion as confidential employees under the statute.

Circumstances change, and the evidence indicates that there have been significant changes affecting this case. Here, a

whole new operation within county government came into being since the adoption of the recognition clause.¹ More pertinent to this determination is that, regardless of whether the 9-1-1 operation was once a "department" of county government, the evidence indicates that it ceased to be such in October of 1987, and has since been operated as a function subordinate to the sheriff by an officer drawn from the sheriff's department. The 9-1-1 system is currently operated by the sheriff's department in much the same manner as the county jail facilities. The employer has not established that the position at issue currently fits the agreed-upon exclusion on which it relies.

FINDINGS OF FACT

1. Spokane County is a political subdivision of the State of Washington, and is a public employer within the meaning of RCW 41.56.030(1).
2. Washington State Council of City and County Employees, Council #2, Local 1553, a bargaining representative within

¹ Although there is no need to decide the issue of contract interpretation in this case, there is ample evidence from which an arbitrator could conclude that the 9-1-1 Emergency Communications System is not a "department" of Spokane County government at the present time. The enabling legislation of September, 1983, created the "emergency services communication board" with a membership which includes citizens from outside the county government. The responsibility of this separate board was to operate an emergency services communications "system", as if it were independent or quasi-independent of the county government. That frame of reference continued into the resolution of October 13, 1987, transferring the administration of the 9-1-1 program to the sheriff. It is only in later letters from the county, dated November 10, 1987 and March 14, 1988, that the 9-1-1 operation referred to as a "department".

- the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of general courthouse employees in Spokane County, including those of the Emergency Communications system. Chief deputies, assistant directors, and secretaries to department heads are excluded from that bargaining unit.
3. Marilyn Bauer has held a clerical position in the offices of the Emergency Communications System since 1982. Until August of 1987, she worked under the direct supervision of the director of the 9-1-1 system and was excluded from the bargaining unit represented by WSCCCE Local 1553. Her exclusion during that period was arguably warranted on multiple grounds of status as a "confidential employee" and/or as a "supervisor" in addition to any exclusion as a department head secretary called for by the terms of the collective bargaining agreement between the parties.
 4. In August, 1987, the director of the Emergency Communications System resigned. Bauer remained in the same position.
 5. In October, 1987, Spokane County Sheriff Larry Erickson was named as the "temporary" head of the Emergency Communications System. Erickson appointed an employee of the Sheriffs' Department, Lieutenant Ray Stavig, to manage the Emergency Communications System on his behalf. Two other individuals were assigned from outside of the Emergency Communications System workforce to take over testing and training of employees. Bauer remained in the same position, but was told to cease her duties which related to personnel, hiring, training, or related matters. Thereafter, Bauer has had little to do with confidential labor relations matters.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-35 WAC.
2. The position held by Marilyn Bauer is not currently that of a confidential employee within the meaning of RCW 41.56.030(2)(c).
3. The position held by Marilyn Bauer does not currently have duties, skills or working conditions which warrant the exclusion of that position from the bargaining unit represented by Local 1553 as a "supervisor".
4. Spokane County has not established that the position held by Marilyn Bauer is currently that of a secretary to a department head, so as to warrant exclusion under the terms of the collective bargaining agreement between Spokane County and WSCCCE Local 1553, and it appears that the position shares a community of interest with other office clerical employees in that bargaining unit.

ORDER CLARIFYING BARGAINING UNIT

The position of secretary in the 9-1-1 Emergency Communications System of Spokane County is included in the existing bargaining unit of "courthouse" employees represented by Local 1553.

DATED at Olympia, Washington, this 23rd day of September, 1988.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-35-210.